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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1613

CALLMAN GOTTESMAN, MARIA MATTIELLO and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: May 28, 1971.

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I.

To quote this Court is not to "dissemble", as charged by du Pont in an attempt to escape the precedential importance of this case.

Du Pont charges (Br. 8, n. 11) that petitioners "dissemble" in quoting the very words of this Court that du Pont's competitors "were never afterwards in serious contention" following du Pont's use of its stock interest in General Motors to sweep into a "commanding lead" in the General Motors market (*United States* v. *E. I. du Pont de Nemours & Company*, 353 U. S. 586, 603).

Such a charge answers itself and is without justification. It does serve, however, to emphasize how far the Court

below has gone in sanctioning a departure from the usual and accepted course of judicial proceedings, a departure which contradicts the holding of this Court upon the *identical* basic facts found at greater length and in greater detail by Judge LaBuy in the government case[1] (126 F. Supp. 235).

The issue here is not how far inconsistency should be indulged; rather, it is whether this Court should countenance contradiction at all.

We do not believe that this Court will join the courts below in ". . . lightly inferring an abandonment of [du Pont's] unlawful activities . . ." Instead, du Pont "is to be judged by what the parties actually did rather than by the words they used." Any other "conclusion must rest on speculation" (*United States* v. *Parke, Davis & Company,* 362 U. S. 29, 48, 44, 47).

This Court further stated in *Parke, Davis* (362 U. S. at 45):

> "Because of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts." (Citing, among others, *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586 and *United States* v. *United States Gypsum Co.,* 333 U. S. 364).

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[1] The comparative table hereto annexed as Appendix C (C1-C3) demonstrates how the courts below, on the identical basic facts, duplicated the findings and conclusions of Judge La Buy in every respect except one. In the government case the District Judge held that du Pont did not have the power to control General Motors (126 F. Supp. at 254-255); here, the District Judge held, and the court below affirmed, that du Pont had, but did not use, its power to control or influence General Motors (A52-53, 279 F. Supp. at 368-369): "The business relationships growing out of the sale of automotive fabrics and finishes by du Pont to General Motors were completely unrelated to the stock interest that du Pont held in General Motors" (A89, 279 F. Supp. at 385; A12, n. 27, 436 F. 2d 1205, 1212).

Du Pont simply says this case is "devoid of precedential signifiance" (Br. p. 17). This of course overlooks and disregards the fact that at issue is the burden of proof in antitrust cases, including Section 7 of the Clayton Act, and the proliferating conflicts among the circuits as to the right to recover damages *at all* for violations of Section 7.

In *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 328-329 this Court discussed diminution of competition resulting from "a vertical arrangement". Then, referring to "the size of the share of the market foreclosed", this Court said:

> "If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act. And the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be *less stringent* than those used in applying the Sherman Act. On the other hand, foreclosure of a de minimis share of the market will not tend 'substantially to lessen competition.' " (Emphasis added; footnotes omitted).

Mr. Chief Justice Burger, as a Circuit Judge, specifically noted in *Reynolds Metals Company* v. *Federal Trade Commission,* 309 F. 2d 223, that *actual* restraints are provable under Section 7. Speaking for the Court, he stated (at page 230):

> "That such a potential emerged from the combination of Reynolds and Arrow was enough to bring it within Sec. 7. But the Commission on substantial evidence has additionally provided us with a finding of *actual* anti-competitive effect . . ." (Emphasis added by the Court; footnote omitted).

Notwithstanding this recognition by the District of Columbia Circuit of "*actual* anti-competitive effect", the Eighth Circuit in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F. 2d 725, 728 relied, among others, on Judge Metzner's pre-trial opinion herein (A90-A99, 221 F. Supp. 488), saying (n. 3):

> "That no private right of action accrues from such a violation, see: *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F. 2d 656 (9 Cir. 1963); *United States* v. *Continental Can Co.*, D. C. 217 F. Supp. 761, 767 (1963); *United States* v. *Ingersoll-Rand Co., et al.*, 218 F. Supp. 530 (W. D. Penna. 1963) aff'd 320 F. 2d 509 (3 Cir. 1963); *Gottesman* v. *General Motors Corp.*, 221 F. Supp. 488 (S.D.N.Y. 1963)."

The confusion in the lower courts and the conflict among the circuits is extensively described in "*Treble Damage Actions for Violations of Section 7 of the Clayton Act*" (38 Univ. of Chicago Law Rev. 404 [No. 2, Winter 1971]). The case at bar is a principal cause of such confusion and conflict. Lower courts have failed to recognize that *actual* restraint constitutes a violation of Section 7 and have confused it with *potential* restraint, a likelihood or probability which might never ripen into actual restraint. Thus, the public remedy against incipiency or probability has been misinterpreted and misconstrued to bar a private remedy for actual restraints based on post-acquisition evidence.

II.

This petition involves only questions of law as to whether the Courts below applied the proper legal standard to the undisputed basic facts.

There is, and there can be, no valid dispute here as to the basic facts. Only legal issues are presented. The basic facts are identical with those considered and passed

upon by the District Court in the government case[2] (126 F. Supp. 235). They are the identical facts upon which this Court twice reversed the conclusions of the District Judge in the government case (353 U. S. 586; 366 U. S. 316).

The additional basic facts herein come from du Pont's contemporaneous records and out of the mouths of du Pont's highest operating officials. They show that du Pont was able to charge and obtain higher mark-ups over both mill cost and replacement cost and thus obtain higher prices and larger profit margins on all automotive finishes and fabrics in all price ranges it sold to General Motors than it was able to obtain in the competitive market from Ford, Chrysler and others.

III.

Du Pont cannot be heard to impeach its own contemporaneous cost and profit records, especially in view of its deliberate and persistent refusal to produce its records of "matching" products.

Seeking to create a question of fact where none exists du Pont attempts to impeach its own contemporaneous corporate records. Du Pont says that its own records do not tell the truth about cost, selling prices and profit margins on finishes and fabrics it sold to General Motors as distinguished from the same or comparable products it sold to others (Br. 24-26). The simple answer is that du Pont's contemporaneous records were adequate to keep the management of du Pont fully informed of cost and profit margins on finishes and fabrics it sold to General Motors and others. They were good enough for du Pont's corporate purposes, and they should have been good enough for the courts below.

In any event, if du Pont had charged General Motors no more than it did Ford and Chrysler for the same or com-

[2] See Appendix C hereto annexed.

parable products it would have been a simple matter for du Pont to prove it. At the pre-trial hearing of August 3, 1966 (Tr. 611-613) petitioners demanded that du Pont produce its cost and profit figures on "matching" products. Du Pont admitted that its records were available and that the products could be "matched up". Thereupon Judge Metzner commented: "But isn't that really the nub of this case?" Nevertheless, du Pont persisted in its refusal to produce its records of "matching" products.

The remand (A21, 414 F. 2d 956) gave du Pont a last clear chance to produce the cost and profit figures on "matching" products which it admittedly had. At the last conference on remand on March 30, 1970 (Tr. 36-38) petitioners renewed their demand that du Pont produce its records on "matching" products. Du Pont still refused to do so.

Du Pont's refusal to produce its matching products can only be explained by the fact that the production of the cost and profit data on "matching" products would have confirmed the truth of the records it did produce.

Instead, du Pont has searched out of nearly $400,000,000 of sales a particular cost group of thinners (No. 740) from which other manufacturers bought in 1959 a total of $13,324 at 10¢ a gallon higher than thinners purchased by General Motors in the same cost group (Br. 26, n. 32 referring to PX 342). However, du Pont neglects to state that the exhibit itself shows that General Motors bought cheaper products in the cost group, costing du Pont 61.75¢ a gallon to manufacture, affording du Pont a mark-up of 20¢ a gallon (or 33%), while thinners in the same cost group sold to other automotive manufacturers cost du Pont 80¢ a gallon, affording du Pont a 12¢ mark-up (or 15%).

In 1959 *all* thinners sold to General Motors produced a profit to du Pont of 37.4% over mill cost, while *all* thinners sold to other automotive manufacturers produced a profit over mill cost of 4.8%, or less than one-seventh as high (PX 368).

IV.

Du Pont's brief makes no attempt to reconcile or justify the contradiction of this Court by the courts below.

To avoid the proper legal standards it was first necessary for the trial court to decapitate General Motors and then employ the proscribed judicial methodology of ". . . tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." (*Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699).

"Du Pont sales pressure" and "efforts of high-ranking du Pont and General Motors executives" which only in 1947 and 1948 "collapsed" the "resistance" of the Fisher Body division which had theretofore been shielded by a voting trust (353 U. S. at 604-605) were ignored by the courts below. They refused to recognize General Motors as a body corporate, and in place of the corporate entity hypothesized unmanageable divisions.

This hypothesis, this decisional technique of refusing to recognize General Motors as a body corporate, and "wiping the slate clean after scrutiny" of particular divisions, is all that du Pont can offer to justify Judge Metzner's conclusions that

> "In summary, no patterns of control by du Pont over purchases by General Motors had evolved in the period prior to 1950." (A67, 279 F. Supp. at 375)

and

> "The business relationships growing out of the sale of automotive fabrics and finishes by du Pont to General Motors were completely unrelated to the stock interest that du Pont held in General Motors." (A89, 279 F. Supp. at 385; A12, n. 27, 436 F. 2d 1205, 1212).

CONCLUSION

For the reasons set forth in the petition and herein, we respectfully urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: May 28, 1971.

APPENDIX C

Comparison of the joint trial opinion of Judge Metzner with the 1954 opinion of Judge La Buy in the Government case.

Subject Matter	Judge Metzner	Judge La Buy
	A44-A89; 270 F. Supp. 360-385	126 F. Supp. 233-335
The Relationship Between the Corporations	A44-A46; 270 F. Supp. at 363-365	126 F. Supp. at 240-242
	A45; *Id.* at 365-366	*Id.* at 226-227
	A45-A46; *Id.* at 365-366	*Id.* at 243-246
	A46; *Id.* at 365	*Id.* at 251, 254
	A46-A49; *Id.* at 366-367	*Id.* at 246-248
	A49-A50; *Id.* at 367	*Id.* at 248-250, 251, 253
Control of General Motors by du Pont	A50-A53; *Id.* at 367-369	*Id.* at 245-246, 254-255
The Antitrust Claims	A53-A54; *Id.* at 369	*Id.* at 295-296, 300-301
Alleged Historical Patterns of Control		
Re: Purchasing Practices	A55-A57; *Id.* at 369-370	*Id.* at 244, 268, 269, 296, 297
	A56; *Id.* at 370	*Id.* at 274, 275, 276, 292-293, 299-300
	A56-A57; *Id.* at 370-373	*Id.* at 272-274, 295

CONCLUSION

For the reasons set forth in the petition and herein, we respectfully urge that the Petition for Writ of Certiorari be granted.

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APPENDIX C

Comparison of the post trial opinion of Judge Metzner with the 1954 opinion of Judge La Buy in the government case.

Subject Matter	Judge Metzner A40-A89; 279 F. Supp. 361-385	Judge La Buy 126 F. Supp. 235-335
The Relationship Between the Corporations	A44-A46; 279 F. Supp. at 364-365	126 F. Supp. at 240-242
	A45; *Id.* at 365-366	*Id.* at 266-267
	A45-A46; *Id.* at 365-366	*Id.* at 243-246
	A46; *Id.* at 365	*Id.* at 251, 254
	A46-A49; *Id.* at 366-367	*Id.* at 246-248
	A49-A50; *Id.* at 367	*Id.* at 248-250, 251, 253
Control of General Motors by du Pont	A50-A53; *Id.* at 367-369	*Id.* at 245-246, 254-255
The Antitrust Claims	A53-A54; *Id.* at 369	*Id.* at 295-296, 300-301
Alleged Historical Patterns of Control		
Re: Purchasing Practices	A55-A57; *Id.* at 369-370	*Id.* at 244, 268, 269, 296, 297
	A56; *Id.* at 370	*Id.* at 274, 275, 276, 292-293, 299-300
	A56-A57; *Id.* at 370-371	*Id.* at 273-274, 295

Subject Matter	Judge Metzner A40-A89; 279 F. Supp. 361-385	Judge La Buy 126 F. Supp. 235-335
Re: Monetary Rewards	A57-A59; *Id.* at 371-372	*Id.* at 251-253
	A59; *Id.* at 372	*Id.* at 244, 269-276
Re: General Motors Personnel formerly connected with du Pont	A60-A61; *Id.* at 372	*Id.* at 244, 269-270, 271-276
	A61-A63; *Id.* at 373	*Id.* at 244-245, 270, 271-272, 272-277
Re: the "Two Sources of Supply" Policy	A63-A65; *Id.* at 373-374	*Id.* at 277-278
Re: the General Purchasing Committee of General Motors	A65-A67; *Id.* at 375	*Id.* at 276-278
	A67; *Id.* at 375	*Id.* at 237, 296, 301, 335
No Patterns of Control by du Pont over Purchases by General Motors prior to 1950	A67; *Id.* at 375	*Id.* at 334-335
Finishes	A67; *Id.* at 375	*Id.* at 288-296

Subject Matter	Judge Metzner A40-A89; 279 F. Supp. 361-385	Judge La Buy 126 F. Supp. 235-335
	A68-A69; *Id.* at 375-376	*Id.* at 288-289, 290, 293-294, 296
	A69-A70; *Id.* at 376	*Id.* at 290, 289, 292, 294
	A70-A72; *Id.* at 377	*Id.* at 288-290, 291, 293, 296
	A73-A74; *Id.* at 378	*Id.* at 291, 292, 296
	A75-A76; *Id.* at 379	*Id.* at 296, 335
	A76-A77; *Id.* at 379	*Id.* at 287, 292, 296, 335
	A77; *Id.* at 380	*Id.* at 288
	A77-A79; *Id.* at 380	*Id.* at 296, 335
Fabrics	A79-A80; *Id.* at 381	*Id.* at 297, 299
	A80; *Id.* at 381	*Id.* at 299-300, 301
	A83-A84; *Id.* at 383	*Id.* 287-288, 300-301, 335
Fiduciary Claims	A88-A89; *Id.* at 385	*Id.* 296, 301, 335